In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-301

PAUL C. WASHBURN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of a five-count indictment charging willful preparation of a false income tax return, in violation of 26 U.S.C. 7206(2). The indictment alleged that in January 1971 petitioner had willfully and knowingly aided and assisted in the preparation of an amended income tax return for Edward B. McLean for the calendar year 1968, which was false and fraudulent in that it showed the filing status of McLean to be "married filing joint return," when petitioner knew that McLean was not entitled to that filing status nor to the tax benefit resulting from a joint return (Pet. App. I-3 to I-4). The court imposed a fine of $2,500 and an 18-month sentence of imprisonment, of which 60 days was to be served and the balance suspended, with petitioner placed on probation for two years. The court of appeals affirmed the conviction in a brief *per curiam* opinion. It stated (488 F. 2d 139):

> Washburn not only prepared a joint return in 1968 for his client, who was estranged from his wife, when the wife had specifically rejected the idea of jointly filing and, indeed, filed a separate return instead, but Washburn also signed the wife's name to the return pursuant to a claimed power of attorney which he in fact did not have. In the return, certain of the wife's losses were claimed against the husband-client's income.
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> Washburn contends that the Government's evidence was insufficient to sustain the verdict. We disagree. Viewed in the light most favorable to the Government, *Glasser* v. *United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, there was abundant evidence to support the verdict.

No petition for certiorari was filed with respect to this judgment. However, while the case was pending in the court of appeals, petitioner filed in the district court a motion for acquittal and for a new trial on the ground of newly discovered evidence. He alleged that, contrary to their trial testimony, Mr. and Mrs. McLean had agreed in writing several days before the trial in 1973 that they would file joint income tax returns for all open years, including 1968 (Pet. App. II-1 to II-5). The district court denied both motions on February 14, 1974 (Pet. App. IV-1 to IV-3), and the court of appeals affirmed without opinion (Pet. App. V-1). The petition for certiorari seeks review of this judgment affirming the district court's denial of the motions for acquittal and a new trial.

1. Petitioner first contends (Pet. 8-12) that the district court's denial of his motion for a new trial and for judgment of acquittal was predicated upon a misconception of the law relating to the requirements for joint

filing of income tax returns.[1] He urges the district court erroneously held the so-called newly discovered evidence (the 1973 agreement to file joint returns for all open years) to be immaterial because of the misapprehension that the McLeans were barred from filing a joint 1968 return merely because they were not living together at the time the return was filed. There was, however, no such misapprehension by the district court. Petitioner invokes the following statement of the district court in denying his motion for new trial and for judgment of acquittal (Pet. App. IV-1):

> Specifically, the indictment charged Washburn with preparing a fraudulent amended joint return for the tax year 1968 for Edward and Manuela McLean, at a time when Washburn knew Edward McLean was estranged from his wife and not entitled to file a joint return.

The quoted language is taken from the court's finding of facts and is merely an attempt to set forth the charge against petitioner. However, that statement cannot reasonably be construed to be a legal conclusion of the trial judge. That the district court was well aware of the rules of law petitioner claims to have been misapprehended is apparent from the court's instructions to the jury, which were in full agreement with petitioner's view of the law.[2]

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[1]Petitioner cannot now challenge the sufficiency of proof at trial. The judgment of the court of appeals (488 F. 2d 139) on that question is *res judicata*, no petition for a writ of certiorari having been filed. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 75-78; *Rankin* v. *Florida*, 418 F. 2d 482 (C.A. 5).

[2]The court stated as follows (Tr. 393):

> In this case, the Government does not dispute the fact that the McLeans were married at the end of the 1968 tax year and were, therefore, entitled to file a joint tax return if they so elected to do so.
>
> In determining whether or not the amended 1968 joint return is false as to material matter, the question that you must resolve is whether or not Manuela H. McLean gave her consent to file such a joint return.

Similarly, contrary to petitioner's contention (Pet. 9-12), the district court's statement that "the fact that the McLeans subsequently agreed to file a joint return does not make the earlier joint return prepared by Washburn any less fraudulent" (Pet. App. IV-2) does not establish that the court believed that a husband and wife may not elect to file joint returns after previously having filed separately. Even if the McLeans had the right subsequently to file a joint return,[3] an agreement to do so long after the criminal act at issue occurred has no bearing upon petitioner's state of mind at the time he prepared the return in question. Cf. *Willingham* v. *United States*, 289 F. 2d 283 (C.A. 5). Indeed, petitioner himself recognizes that the subsequent agreement has nothing to do with the question of whether or not the return prepared by him was fraudulent; he states (Pet. 10) that "[t]he act of subsequent agreeing to file joint returns pertains to Husband and Wife. Their action does not go to the question of Petitioner's fraud."

2. Petitioner also urges (Pet. 13-16) that the district court erred in holding the so-called newly discovered evidence to be immaterial because it was merely impeaching and because there was other evidence to sustain the conviction. But the district court did not conclude that the subsequent agreement between the McLeans

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[3]In fact, they had no such right. Section 6013(b)(2) of the Internal Revenue Code of 1954 provides that married taxpayers may not file amended joint returns after one spouse has filed separately (as Mrs. McLean had here) unless the amended joint returns are filed within three years from the time the original returns were required to be filed. Thus, the last day on which the McLeans could have filed an amended joint return for 1968 was April 15, 1972, more than a year before the signing of the agreement relied upon by petitioner.

was immaterial on the ground that there was other evidence sufficient to sustain the conviction (see Pet. App. IV). Noting that the sufficiency of the evidence on the issue of the wife's lack of consent was upheld on appeal, the district court held that if the intended use of the so-called newly discovered evidence was to establish that Mrs. McLean had consented to the joint return prepared and presented by petitioner, the evidence at trial was contrary to this conclusion.

There is no doubt that is the so-called newly discovered evidence established that either or both of the McLeans were lying on the crucial issue of consent at the time petitioner prepared the return in question, petitioner would be entitled to a new trial. See *Mesarosh* v. *United States*, 352 U.S. 1. But in view of the court's undisputed finding that the alleged agreement was reached by the McLeans more than two years after the fraudulent return had been filed and could not therefore have affected the falsity of the return, it is plain that Mrs. McLean's trial testimony that she had not consented to the joint return prepared by petitioner was not false.

Since the district court correctly concluded that the agreement did not establish that Mrs. McLean's trial testimony was untruthful,[4] the so-called newly discovered evidence was, at best, impeaching and did not justify a new trial. *United States* v. *Jacquillon*, 469 F. 2d 380, 388 (C.A. 5).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK.
Solicitor General.

DECEMBER 1974.

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[4]Such finding is entitled to the greatest deference by the appellate courts. *United States* v. *Johnson*, 327 U.S. 106.